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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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JAN 9 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of	)	CC Docket No. 94-129
Consumers' Long Distance	)	
Carriers	)	
	)	DOCKET FILE COPY ORIGINAL

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Respectfully submitted,

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January 9, 1995

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Commission's November 10, 1994 Notice of Proposed Rulemaking.[1]

I. INTRODUCTION AND SUMMARY

The Commission instituted this proceeding on its own motion to review its policies governing changes in a customer's pre-selected long distance carrier (commonly known as a "Primary Interexchange Carrier" or "PIC"), and proposing several specific rules relating to unauthorized switches. The FCC's PIC change rules have been developed to strike an appropriate balance between the need to protect customers from unauthorized changes and the need to preserve an IXC's flexibility to

[1] *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, FCC 94-292 (released November 10, 1994) ("Notice").

market its services in ways that will best respond to the dictates of open competition among carriers. CompTel urges the Commission to maintain in any new rules adopted the balance previously struck between IXC marketing flexibility and the integrity of the selection process. On the whole, the Commission's existing rules regarding the role of letters of agency ("LOAs") in the PIC change process have been successful in facilitating legitimate marketing while deterring unscrupulous actions of the few. New rules adopted in this proceeding should be limited to addressing specific problems that have arisen; there is no need for extensive revision to the LOA rules.

In particular, CompTel supports a requirement that the authorization to make a change in a customer's telephone service be separate and distinct from inducements offered to encourage that authorization, and strongly agrees with the FCC's conclusion that inducements should not be prohibited entirely. The variety of offers available to customers is evidence of vigorous competition between carriers, which provides, in a direct sense, a tangible benefit to most customers. The Commission should be careful to preserve this legitimate form of competition while correcting the relatively limited abuses of some participants.

Similarly, CompTel generally supports the Commission's effort to ensure that customers receive clear and accurate information upon which they can make their decision, and would welcome any additional clarification of the scope of permissible IXC marketing activity. However, CompTel urges the Commission to limit its solutions to the resolution of demonstrated problems. Further, the Commission should refrain from making unnecessary and potentially far-reaching judgments concerning the extent of a customer's responsibility for charges in the event an unauthorized switch has occurred. The Commission already has in place informal and formal procedures to encourage the resolution of these issues, and no change should be made absent evidence that these procedures are not working properly.

The Commission should clarify, however, that its proposed rule does not modify existing policies regarding the persons authorized to sign LOAs, and should act to preempt state requirements that regulate PIC change orders or the form and content of LOAs.

II. THE COMMISSION'S EXISTING PIC CHANGE POLICIES HAVE PROVEN SUCCESSFUL IN PROMOTING COMPETITION AND CUSTOMER CHOICE

The Commission has repeatedly stressed that its PIC change policies are designed to "allow IXCs flexibility in their business operations while providing consumers protection against unauthorized PIC changes."[2] In other words, the rules promote competition by maximizing IXC flexibility to market to customers while

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[2] *Policies and Rules Concerning Changing Long Distance Carriers*, 8 FCC Rcd 3215, 3219 (1993) (*PIC Verification Reconsideration Order*); *see also Policies and Rules Concerning Changing Long Distance Carriers*, 7 FCC Rcd 1038, 1045 (1992) (*PIC Verification Order*) (rules were "intended to facilitate the IXCs' marketing efforts while maintaining the protection embodied in the requirement for LOAs"); *Illinois Citizens Utility Board Petition for Rule Making*, 2 FCC Rcd 1726, 1729 (1987) (*Illinois CUB Order*) (same); *Investigation of Access and Divestiture Related Tariffs*, 102 F.C.C.2d 503, 511 (1985) (*Allocation Order Reconsideration*) (rules are "a reasonable accommodation with the IXCs' needs for flexibility in marketing").

respecting the integrity of the customer's choice by protecting them (and IXCs) from changes that are not authorized.

Thus, Commission policies permit customers to change their PIC either by contacting their local exchange carrier ("LEC") directly or by authorizing an IXC to contact the LEC on the customer's behalf.[3] Moreover, IXCs are permitted to obtain that authorization orally or in writing and to submit a change request to a LEC so long as they have "instituted reasonable steps" to obtain a signed LOA.[4] Further, when an IXC obtains an LOA, it is entitled to presume the customer "to have read its contents and to understand the nature and extent of the service relationship with the IXC."[5] The Commission recently required additional verification of PIC change orders obtained via IXC telemarketing efforts, but did not disturb the LOA requirements.[6] Although the LOA is not required before submission of an order, it is kept on file by IXCs for use in "dispute resolution."[7]

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[3] *Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C.2d 911, 925, 929 (1985) (*Allocation Order*). Customer authorization is often obtained in the form of a "letter of agency" (LOA) designating the IXC as the customer's agent for purposes of submitting the order. *Id.* at 929.

[4] *Allocation Order Reconsideration*, 102 F.C.C.2d at 511-12.

[5] *Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C.2d 935, 938 (Com. Car. Bur. 1985) (*Waiver Order*). In this way, the LOA serves as an important safeguard for the IXC as well.

[6] *See PIC Verification Reconsideration Order*, 8 FCC Rcd at 3216. The Commission gave IXCs the flexibility to choose among four approved verification methods, however. *See* 47 C.F.R. § 64.1100.

[7] *Allocation Order*, 101 F.C.C.2d at 929; *Allocation Order Reconsideration*, 102 F.C.C.2d at 512.

Industry experience with these rules has proven them to be very successful in achieving the Commission's goals. IXCs retain significant flexibility to solicit customer authorization, while the dispute resolution role of an LOA provides strong incentives for IXCs to obtain that authorization in writing. Consumers have benefitted from the flexibility to select an IXC, and the LOA rules have, by and large, kept unauthorized changes to a minimum.

This is not to say that there have not been problems, however. Unauthorized changes or "slamming" do occur as a result of IXC or LEC errors, customer misunderstandings, or, sometimes, deliberate misconduct. Where problems have occurred, such as with some telemarketing solicitations, the Commission is right to act to preserve customer choice. The present Notice is another example of the Commission's willingness to address specific instances where its rules appear to be less effective than they should be. In these situations, the Commission should act to remedy the problems, but should be careful not to disturb the overall balance struck between consumer protection and legitimate IXC marketing.

III. SOME ACTION IS APPROPRIATE TO ADDRESS INDUCEMENTS THAT ARE COMBINED WITH LETTERS OF AGENCY

As the interexchange market has become more competitive, IXCs not surprisingly have responded with a variety of innovative attempts to attract customers. One such response has been to provide customers with an incentive to switch, such as free long distance, "reimbursement" for switching fees, entries in contests, or small gifts or rewards. Large and small IXCs have resorted to these techniques, with the result being that customers increasingly benefit in a variety of ways by selecting a long distance carrier.

CompTel agrees with the Notice's conclusion that IXC marketing inducements are beneficial to customers and to competition in interexchange services.[8] CompTel also agrees that the Commission should not prohibit inducements entirely, as this would deprive customers of many tangible benefits they now receive for switching carriers. Moreover, a ban on inducements used to market IXC services might disproportionately harm new entrants and IXCs expanding into new regions, who may wish to distinguish themselves from more well known carriers. In any event, these inducements are part of legitimate marketing efforts by IXCs and should not be prohibited.

CompTel agrees that the potential for customer confusion is reduced if the LOA is distinct from any inducements also offered to the customer. CompTel therefore supports the Commission's proposal to require that the LOA be a separate document in a marketing package. As long as the documents are separate, however, consumers should have little trouble understanding the nature of the relationship that will be created, even if the LOA is contained in the same mailing as a related inducement to choose the IXC's services.[9]

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[8] Notice at ¶ 12.

[9] However, IXCs should be free to combine LOAs with other administrative provisions, so long as they are directly related to the provision of the requested service and are not a part of the promotion, contest or other inducement.

CompTel believes that many of the additional requirements discussed in the Notice are unnecessary at this time, however. For example, the Commission need not mandate a specific LOA that must be used by all IXCs. Rather, the Commission should identify the required elements of an LOA and adopt non-exclusive language that will be deemed to meet the LOA requirement. IXCs should be free, however, to use whatever LOA language they believe appropriate to reach their targeted audience, so long as it contains all of the required elements. With a "safe harbor" approach, IXCs will have the certainty of an approved LOA while maintaining the flexibility to tailor an LOA to meet special circumstances. Further, it is not necessary to prescribe mandatory font sizes or typefaces to be used, nor to require the preprinting of telephone numbers or other information, as these requirements would unnecessarily intrude upon IXC flexibility in their business operations.[10]

Similarly, CompTel does not believe there is any need for the Commission to limit the number of IXCs that may be listed on an LOA, or to restrict which IXCs are identified or how the relationship among IXCs is described.[11] The only requirement, which CompTel believes is implicit in the current rules, should be that the LOA clearly

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[10] CompTel does not oppose a requirement that the pertinent LOA provisions be presented to the customer in whatever language is chosen to communicate other portions of the offer to the customer. However, if the Commission chooses to adopt font or typeface requirements, it should not require that the English translation be of equal size to the foreign language text. In the case of foreign language solicitations, the primary purpose of the English translation is to assist non-bilingual telephone company employees processing the order.

[11] *See* Notice at ¶ 14.

and concisely describe the nature of the relationship created and identify the role of each IXC involved. The goal is to ensure that the customer is informed of the relationship that she is creating, not to limit the type of relationships that might be authorized.

IV. ABSENT EVIDENCE THAT THE COMMISSION'S EXISTING INFORMAL AND FORMAL COMPLAINT PROCEDURES ARE INADEQUATE, THE COMMISSION SHOULD NOT BECOME INVOLVED IN CONSUMER LIABILITY ISSUES

The Commission also has requested comment on the extent of a customer's responsibility for charges that might be imposed by the chosen IXC and by the switching IXC when an unauthorized PIC change occurs.[12] CompTel believes that it is unnecessary for the Commission to address these issues at this time because alternative mechanisms for the consideration of customer disputes appear to be resolving these issues with minimal Commission involvement.

The Commission was presented in 1987 with a similar request to interject itself in these issues. The Commission declined to institute the requested rulemaking proceeding, however, because:

> We note that many carriers have instituted informal proceedings to resolve expeditiously cases of misconnected users and incorrect charges. Moreover, Section 208 complaint remedies can be invoked to recover actual damages in appropriate cases.[13]

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[12] Notice at ¶¶ 16-17.

[13] *Illinois CUB Order*, 2 FCC Rcd at 1729.

This statement is just as true today as it was in 1987. In fact, since 1987, the Commission has improved its own informal complaint process, which is capable of handling most allegations of slamming.

These procedures appear to be working adequately to address any disputes regarding customer responsibility for charges when unauthorized switches occur, often with little or no direct Commission involvement. The Commission should not create new procedures, therefore, unless there is evidence that the existing formal and informal processes have failed. Similarly, the existing procedures appear to provide an appropriate mechanism (including, in particular, the many safeguards of an adjudicatory proceeding) for the Commission to consider liability issues should the need arise. Thus, it is not necessary for the Commission to address these issues in a rulemaking context. Finally, it is important to note that Commission action could cause disputes that are resolved privately today (and to the satisfaction of the parties involved) to be resolved through the Commission instead.

V. THE COMMISSION SHOULD CLARIFY THAT ITS PROPOSALS DO NOT RESTRICT THE CLASS OF PERSONS WHO MAY AUTHORIZE A PIC CHANGE

The proposed rule included in Appendix A of the Notice uses the term "subscriber" to describe the person signing an LOA.[14] The *Allocation Order*,

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[14] *See, e.g.*, Proposed Rule § 64.1150(b) ("The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the primary interexchange carrier change.").

however, uses the term "customer," as do the current PIC verification rules.[15] CompTel requests that the Commission clarify that the substitution of the term "subscriber" in the proposed rule was not intended to restrict the class of persons who are able to authorize a PIC change, and therefore to sign an LOA. In the alternative, CompTel requests that the Commission clarify which individuals will be considered to have authority to select a primary interexchange carrier for a particular telephone line.[16]

VI. THE COMMISSION SHOULD PREEMPT STATE REGULATION OF THE FORM AND CONTENT OF PIC CHANGE REQUESTS

The central premise of the Commission's PIC change policies has been to promote competition by "allow[ing] IXCs flexibility in their business operations while providing consumers protection against unauthorized PIC changes."[17] This goal is embodied in LOA requirements and verification procedures previously adopted by the Commission, and -- equally importantly -- in the "flexibility" left to IXCs by the absence of FCC regulations. These federal policies would be undermined, however, by

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[15] *See* 47 C.F.R. § 64.1100; *Allocation Order*, 101 F.C.C.2d at 929.

[16] CompTel recommends, in the event additional clarification is deemed necessary, that the Commission require LOAs to contain a statement that the person signing the LOA has authority to order telephone service changes for the designated telephone lines, and that the Commission adopt a "safe harbor" permitting IXCs to treat this representation as conclusive proof of the individual's actual authority, absent specific prior evidence to the contrary.

[17] *PIC Verification Reconsideration Order*, 8 FCC Rcd at 3219; *see supra*, pp. 3-4.

state regulation of PIC change requests, including in particular by state regulation of the form or content of an LOA. Therefore, CompTel urges the Commission to clarify that its regulations preempt state regulation of IXC solicitation of PIC change requests and the form and content of LOAs.

The FCC's authority to preempt state regulation of PIC change orders is clear. The FCC's authority over *interstate* PIC changes is, of course, exclusive. Moreover, the FCC may preempt state regulation of intrastate PIC changes if it is "not possible" to separate the interstate and intrastate components of a PIC change. *Public Utility Comm'n of Texas v. FCC*, 886 F.2d 1325, 1331-33 (D.C. Cir. 1989) (citing *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)); *see also Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C. Cir. 1989). In such situations, the FCC is empowered to preempt state regulations that would negate federal goals. *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). In the case of PIC changes, since it is not possible to separate interstate PICs and intrastate PICs and apply different rules to each, the state requirements should be preempted.

Under the equal access procedures implemented by the LECs -- and approved by this Commission -- a customer may select only one "primary" carrier for interexchange calls. LECs do not permit a customer to designate an interstate "primary" carrier and a separate intrastate "primary" carrier. Rather, a customer has a single "primary interexchange carrier," and, by necessity, submits a single request to change that carrier, regardless of whether the customer will be making interstate or intrastate calls using that carrier. The interstate PIC, therefore, is inseparable from the intrastate PIC.

Consequently, it would be impossible to subject a PIC change order to two differing requirements. This is more than just a theoretical concern, however. CompTel is aware of at least one state that is presently considering specific requirements for the form and content of an LOA.[18]

It is appropriate for the FCC to issue an order clarifying that such requirements are preempted.[19] State regulation that goes beyond the requirements adopted by the FCC thwarts the federal policy of "allow[ing] IXCs flexibility in their business operations while providing consumers protection against unauthorized PIC changes."[20] State regulation may directly conflict with a federal policy, such as a state ban on any inducements to switch carriers. It also may effectively negate the federal policy, such

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[18] *In re: Proposed Revisions to Rule 25-4.118, F.A.C., Interexchange Carrier Selection*, Docket No. 941190-TI (Florida Public Service Commission, issued December 15, 1994). The Florida PSC, for example, is proposing specific language which must be contained immediately above the customer signature on an LOA. If the FCC were to adopt different specific language for an LOA or require that the language appear in a different location, however, it would be impossible for IXCs to comply with both requirements, at least without requiring the customer to sign two separate LOAs for the same PIC change.

[19] It is also clear that the Commission has the power to issue such an order in this proceeding. *See, e.g., ARINC v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991) (agency may adopt any proposal that is a "logical outgrowth" of the rulemaking notice); *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988) (same); *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (same). A preemption order is a "logical outgrowth" of the Notice's proposal to "clearly delineat[e]" what may and may not be in an LOA. Notice at ¶ 7.

[20] *PIC Verification Reconsideration Order*, 8 FCC Rcd at 3219; *see also*, *PIC Verification Order*, 7 FCC Rcd at 1045.

as by requiring additional language in an LOA or by requiring additional verification procedures for PIC change orders. Such regulations limit the IXCs' marketing flexibility in soliciting a PIC change order from a customer, thereby impeding the federal policy. Accordingly, the Commission should preempt all state regulation of PIC change orders, including rules regarding the need for an LOA or verification, and rules regarding the form and content of LOAs.

VII. CONCLUSION

CompTel welcomes the Commission's effort to remedy specific problems that have arisen regarding PIC change orders. CompTel supports the Commission's decision to continue to permit IXCs to offer inducements for customers to switch carriers, but to require that such inducements be presented in documents separate from the LOA authorizing the PIC change. CompTel believes that the remainder of the Commission's rules strike a workable balance between consumer protection and legitimate IXC marketing activities, and therefore does not believe any other rule changes are necessary at this time. The Commission, however, should clarify that no substantive changes were intended by the proposed rule's use of the term "subscriber" rather than "customer" and should protect federal interests in interexchange competition by preempting state regulation of PIC change solicitations and LOA form and content requirements.

Respectfully submitted,

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January 9, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 1995, I caused copies of the foregoing "Comments of the Competitive Telecommunications Association" to be served via hand delivery, upon each of the following parties listed below.

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